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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LOUIE ARELLO CORDERO, Defendant and Appellant.	E064074 (Super.Ct.No. FVI1202444) OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Louie Arello Cordero petitioned to have his 2013 conviction for second degree commercial burglary (Pen. Code,[1] § 459) reduced to a misdemeanor pursuant to the Safe Neighborhood and Schools Act, enacted by the voters as Proposition 47 in the November 2014 election. The trial court denied the petition, finding that defendant was not eligible for relief because he had burglarized a closed business. (See § 459.5 [added by Proposition 47, defining offense of shoplifting].)

In this appeal, defendant asserts three claims of error with respect to the trial court's denial of his petition. First, defendant argues the petition should have been granted, because "the record reveals no admissible evidence" demonstrating that the business he burglarized was closed at the time, or showing the value of the property taken. Second, defendant argues that the trial court's findings of fact violate his rights under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny. Third, defendant argues that *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*) and its progeny require the trial court to presume that the burglary took place during business hours and that the value of the property taken was below $950, in the absence of evidence to the contrary in his record of conviction. We reject each of these arguments, and affirm.

I. FACTS AND PROCEDURAL BACKGROUND

On July 26, 2013, defendant pleaded no contest to one count of second degree robbery (§ 211) and one count of second degree commercial burglary (§ 459). According

[1] Further undesignated references are to the Penal Code.

to the probation report, the burglary conviction arose from an incident involving two suspects who broke into a pharmacy, setting off a burglary alarm at 12:57 a.m. on September 11, 2012, and who stole an unknown number of packs of cigarettes, with a third suspect driving a getaway vehicle. Defendant received a sentence of five years eight months in state prison.

On May 20, 2015, defendant filed in propria persona a petition pursuant to Proposition 47, seeking to have the burglary count reduced to a misdemeanor.[2] On July 20, 2015, after a hearing—albeit one during which no evidence or argument was presented, either by defendant or the People—the trial court ruled that defendant's burglary charge could not be reduced to misdemeanor shoplifting because defendant had broken into a business that was closed.

II. DISCUSSION

A. Background Regarding Proposition 47.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085.) As relevant to the present case, section 459.5, added by Proposition 47, redefines certain conduct that previously was punishable as felony burglary to instead be the misdemeanor

[2] A previous petition by defendant with respect to both conviction offenses, styled as a petition for writ of habeas corpus, was also denied by the trial court, but that ruling is not at issue in the present appeal.

offense of shoplifting: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)

B. Analysis.

1. Defendant Had the Burden of Showing Eligibility for Relief, and Failed to Carry It.

Defendant argues that a lack of evidence in the record showing him not to be eligible for relief under Proposition 47 means that the trial court should have granted his petition. This argument fails, because a defendant who files a petition under Proposition 47 bears the burden of establishing he is eligible for the relief requested. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878-880 (*Sherow*).) In this case, therefore, defendant's burden was to demonstrate that the store he burglarized was closed at the time of entry, and that the value of the property he took did not exceed the threshold amount of $950. (§ 459, subd. (a).) Defendant did not do so, presenting no evidence or argument with respect to those factual issues. On that basis alone, the trial court properly denied defendant's petition.

Defendant argues that we should decline to follow *Sherow*. *Sherow*'s analysis, however, has rapidly become settled law—at least, as settled as any issue can be, when the California Supreme Court has not yet had an opportunity to consider it—with *Sherow*'s analysis representing the unanimous opinion of California appellate courts to have addressed the issue. We typically follow the decisions of other appellate districts or

divisions, in the absence of good reason to disagree. (*People v. Gipson* (2013) 213 Cal.App.4th 1523, 1529.) We find no reason to disagree with *Sherow*'s reasoning. Indeed, this court has previously followed *Sherow* on a number of previous occasions, including in published and previously published opinions. (E.g., *People v. Brown* (2016) 244 Cal.App.4th 1170, rev. granted Apr. 27, 2016, S233274.) There is no appropriate reason for us to decide the issue any differently in this case.

2. Defendant's Apprendi Rights Were Not Violated.

Defendant contends that judicial fact finding with respect to his eligibility for relief under Proposition 47 violates his right to jury trial, as articulated in *Apprendi*, *supra*, 530 U.S. 466, as well as cases following *Apprendi*. Not so.

"[N]umerous courts have rejected this argument in similar contexts." (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 451 (*Rivas-Colon*.) At least one published California appellate decision has rejected this argument in the exact same context: "'[T]he resentencing provisions of Proposition 47 deal with persons who have already been proved guilty of their offenses beyond a reasonable doubt.' [Citation.] The question presented by [defendant's] resentencing petition was not whether to increase the punishment for his offense, but whether he was eligible for a potential reduction of his sentence. As a result, [defendant] had 'no right to a jury determination of his eligibility for resentencing.'" (*Ibid*.)

Defendant has acknowledged this contrary authority exists, arguing only that it is wrongly decided. Again, we decline defendant's invitation to part ways with existing

appellate authority on an issue, because we find the reasoning expressed in that authority persuasive.

3. Guerrero Is Not Applicable in Proposition 47 Resentencing Cases.

Pursuant to the California Supreme Court's holding in *Guerrero, supra*, 44 Cal.3d 343, and the line of cases that follow it, where the facts are limited to the record of conviction in a prior case and the record "does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable." (*Id.* at 352.) Defendant argues that this principle renders the trial court's denial of his petition erroneous. We disagree.

The principle articulated in *Guerrero* is not applicable in Proposition 47 resentencing cases. *Guerrero* is applicable where the prosecution seeks to enhance a current sentence based on the facts of a prior case. (*Guerrero*, *supra*, 44 Cal.3d at pp. 354-355 [holding that "in determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction"].) The prosecution has the burden of establishing that sentencing enhancements apply. (E.g., *People v. Towers* (2007) 150 Cal.App.4th 1273, 1277 ["The prosecution bears the burden of proving beyond a reasonable doubt that a defendant's prior convictions were for either serious or violent felonies."].) As a result, any failure of evidence regarding a sentencing enhancement means the prosecution has failed to carry its burden of proof. Here, as discussed above, the defendant seeking relief pursuant to Proposition 47 must carry the burden of showing eligibility. In this setting, any failure of proof cuts against the defendant.

Defendant contends *People v. Bradford* (2014) 227 Cal.App.4th 1322, which relies on *Guerrero*, supports relieving him of the burden of proof. We disagree. In *Bradford*, the Third District held that under the Three Strikes Reform Act of 2012, the prosecution was not permitted to go outside the record of conviction to establish a defendant is ineligible for resentencing on the basis of the nature of his conviction. (*People v. Bradford*, *supra*, at p. 1339.) The *Bradford* court did not relieve the defendant of his burden of presenting evidence to support his petition. On the contrary, the court indicated "the petitioner would be well advised to address eligibility concerns in the initial petition for resentencing." (*Id.* at p. 1341.)

In defendant's petition, he raised eligibility issues only in a conclusory manner, asserting without specifics that he was eligible for relief under Proposition 47. He did not offer testimony or other evidence concerning whether the business he burglarized was open during regular business hours when he entered it, or the value of the items taken. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.) "A proper petition could certainly contain at least [petitioner's] testimony [on the relevant issues]. If he made the initial showing the court [could] take such action as appropriate to grant the petition or permit further factual determination." (*Ibid.*) Without such a showing, the trial court did not err in deciding that defendant had not established his eligibility for resentencing.

4. Although Defendant Has Not Established Eligibility for Relief, It Is Conceivable He Could Do So in a Subsequent Petition.

In the alternative to the arguments we address above, defendant requests, quoting *Sherow*, *supra*, 239 Cal.App.4th at p. 881, that we affirm the trial court's denial order

"'without prejudice to subsequent consideration of a properly filed petition.'" Particularly given that *Sherow* was decided after defendant had already filed his petition, it is appropriate to give defendant another opportunity to attempt to carry his burden of showing eligibility.

To be sure, from the present record it seems unlikely that defendant is eligible for relief under Proposition 47. The probation report at least strongly suggests that defendant's burglary conviction did not arise from his "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours" (§ 459.5, subd. (a)), but rather the burglary of a closed business, though it does not say so in so many words. Nevertheless, a probation report is not a judge or jury's finding of fact, and it is conceivable that it is erroneous or misleading in this respect. If so, defendant should have an opportunity to demonstrate the error, in addition to affirmatively establishing the other requirements for eligibility for relief.

III. DISPOSITION

The order appealed from is affirmed without prejudice to subsequent consideration of a properly filed petition.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.